88-752

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ROGER MARTIN,

Petitioner,

v.

ALBERT LEE WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether qualified immunity for a police officer charged with shooting an aggressor is to be determined on the objective reasonableness of the officer's actions under the Fourth Amendment without regard to the officer's motives underlying the shooting; or

2. Whether qualified immunity for a police officer charged with shooting an aggressor is to be determined under the Fourteenth Amendment where substantive due process claims call into account the underlying subjective motivations of that officer as material to whether or not the immunity should be granted short of trial on the issue of such subjective motivations.

PARTIES IN THE COURT BELOW

Before the United States Court of Appeals for the Eighth Circuit, as well as before the United States District Court for the Southern District Court of Iowa, Respondent, Albert Lee Walker et al.,* were represented by John R. Sandre and Thomas J. Lewis. There are no other parties.

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*In addition to Albert Lee Walker, Respondent, Judith Walker, William J. Walker, Laura Christine Walker, Tonya Faye Walker, and Tanya Renee Walker were parties plaintiff below.

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In The

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ROGER MARTIN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, (Appendix B) is reported at 850 F.2d 433; the rulings of the district court (Appendix C, F) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1988. Petitioner Martin filed a Petition for Rehearing with the suggestion for *en banc* review on July 11, 1988. The Petition for Rehearing was denied on

August 12, 1988. This Court's jurisdiction is invoked under 28 United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT
SECTION 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS
42 United States Code Section 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent Walker commenced this action in the district court on October 17, 1984, under 42 United States Code Section 1983, premising jurisdiction under 28 United States Code Sections 1331 and 1343 alleging violation of his Fourth and Fourteenth Amendment rights.

On June 3, 1984, Petitioner Martin, an off-duty Wayne County, Iowa Sheriff's Deputy, observed Respondent Walker recklessly driving around Humeston, Iowa, in Walker's pickup truck. Martin recognized the truck as Walker's and changed into his uniform leaving his service revolver at home, but taking his sap. Martin found Walker in the street in front of his home holding a can of beer. Martin determined Walker was intoxicated and arrested him, before Walker began fighting with Martin, a fact admitted in Walker's deposition. During the struggle, Walker's wife, Judy, and daughter, Laura, intervened both disarming Martin of his sap and beating Martin as well. Martin retreated to his squad car and radioed an "emergency" call, but help was miles away. Mrs. Walker then began to taunt or threaten Martin with the sap she had taken from him and Martin shoved her away. This

infuriated Mr. Walker who told Martin he would kill him and Walker returned immediately into his pickup truck where Martin could not see his actions. Martin got back into his squad car and radioed again "emergency" and "man with a gun." Martin then got out of his squad car with his shotgun and ordered Walker out of his pickup truck. When Walker exited the truck, he advanced quickly toward Martin and yelled, "I'm going to kill you." Martin ordered Walker to halt two or three times, but when he did not, shot Walker once, fearing for his life if the two fought again and Walker was able to gain control of his shotgun.

Martin filed a Motion for Summary Judgment claiming qualified immunity which was supported by his own explanation for this use of force as well as affidavit and deposition eye witness accounts, other evidence complied partially in a police investigation of the shooting, and admissions the Walkers had made. The Walkers filed no evidentiary materials in resistance claiming only that Martin was not in fear of his life and had acted with a wrongful state of mind. The district court overruled that Motion finding material facts in dispute. (Appendix F). Officer Martin appealed denial of the qualified immunity. (Appendix E). On appeal, the Eighth Circuit remanded to the district court for an identification of those material facts in dispute. (Appendix D). On remand, the district court supplied those facts. (Appendix C). Back on appeal, the Eighth Circuit affirmed finding it disputed whether Walker was belligerent and had threatened Martin's life and, thus, whether Martin's shooting constituted the use of "excessive force." (Appendix B). Martin filed a Petition for Rehearing with the Circuit Court explaining that,

under the Fourth Amendment, the objective facts surrounding the shooting showed that clearly established law was not violated and the immunity should be sustained. Alternatively, if analyzed under the Fourteenth Amendment, where an excessive force claim requires proof of the officer's malice, the Court erred by failing to structure a method for resolving qualified immunity claims, particularly where, after full blown discovery below, Walker could prove no malice actuating Martin's conduct. The Circuit Court denied the Petition for Rehearing. (Appendix A).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Certiorari should be granted to resolve important issues, dividing the circuit courts of appeal, concerning whether qualified immunity should be extended to a police officer who shoots an assailant under the "objective reasonableness" standard of the Fourth Amendment and, if not, how qualified immunity is to be determined when the substantive law of plaintiff's claim, here also the Fourteenth Amendment, puts at issue a defendant's subjective motivation for the asserted illegal action.

I.

QUALIFIED IMMUNITY IN EXCESSIVE FORCE CASES SHOULD BE DETERMINED UNDER THE FOURTH AMENDMENT'S OBJECTIVE REQUIREMENTS.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) established that the grant of qualified immunity is dependent on whether a defendant's conduct violates clearly established rights. *Davis v. Scherer*, 468 U.S. 183, 191 (1984) held the immunity available if a defendant's conduct was objectively reasonable as measured by reference to clearly established law. *Harlow* is said to have rejected the inquiry into a defendant's state of mind in favor of a wholly objective standard, *Id.*, purging the doctrine of its subjective components. *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985). *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3040 (1987) again confirmed the irrelevance of a defendant's subjective beliefs about the action taken focusing on the objective legal reasonableness of the official action. *Id.*, at ___ U.S. ___, 107 S.Ct. 3041-42. This reshaped qualified immunity doctrine was to apply "across the board," *Harlow*, 457 U.S., at 821, *Anderson*, ___ U.S. ___, 107 S.Ct. 3040, so that the immunity would protect "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), especially in view of the difficulty facing law enforcement officers in making difficult determinations of law. *Anderson*, ___ U.S. ___, 107 S.Ct. 3041. This qualified immunity determination is to be resolved as a matter of law disregarding plaintiff's version of the facts, *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), with an eye only

to "the information the searching officers possessed," *Anderson*, ___ U.S. ___, 107 S.Ct. 3040, so that, if reasonably competent police officers could debate probable cause issues, the immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In *Tennessee v. Garner*, 471 U.S. 1 (1985) this Court held that a policeman's shooting of a person was a seizure subject to the Fourth Amendment's "reasonableness requirement" based upon the totality of circumstances known to the shooting officer. It held, however, that use of deadly force was not unconstitutional "(w)here the officer has probable cause to believe that the subject poses a threat of serious physical harm, either to the officer or others . . . and if, where feasible, some warning has been given." *Id.* at 11-12. Since the existence of probable cause for a warrantless arrest is to be made from the "facts and circumstances within the officer's knowledge . . . ", *Michigan v. De Filippo*, 443 U.S. 31, 37 (1979), qualified immunity should also turn on the objective legal reasonableness under the Fourth Amendment[1] of a police officer's split second shooting decision[2] judged only by the information that officer possessed at the time.[3]

Specifically, the qualified immunity formulation of *Harlow* as applied in the Fourth Amendment contexts

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[1] *Lester v. City of Chicago*, 830 F.2d 706, 710-713 (7th Cir. 1987) ("An objectively unreasonable seizure violates the Constitution regardless of an officer's good intent; likewise, an objectively reasonable seizure does not violate the Constitution despite the officer's bad intent.") *Id.*, at 712.

[2] *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988).

[3] *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988).

presented by *Malley v. Briggs*, 475 U.S. 335 (1986) and *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034 (1987) should apply in the context of excessive force cases and embrace the same principles in a search to determine whether the officer's actions are objectively legally reasonable, *Klein v. Ryan*, 847 F.2d 368, 372 (7th Cir. 1988); *Garcia by Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987); *Washington v. Starke*, 855 F.2d 346 (6th Cir. 1988), thus avoiding the need to determine the officer's subjective motivations when the excessive force claim is cast as a Fourteenth Amendment substantive due process violation, as here. *Garcia by Garcia v. Miera*, 817 F.2d 650, 655 n.7 (10th Cir. 1987); See *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1431-1436 (D.C. Cir. 1987) *reh. den. sub. nom.* 824 F.2d 1240 (D.C. Cir. 1987).

Below, Respondent Walker did not contest Petitioner Martin's factual showing of the objective reasonableness surrounding the shooting of an individual threatening death to an officer who refuses to halt when ordered. Walker asserted only that Martin's state of mind was an issue for jury resolution thus precluding the grant of qualified immunity. Despite Martin's Petition for Rehearing to the Circuit Court calling for application of objectively based qualified immunity eliminating inquiry into Martin's state of mind, the Circuit Court held that the Walkers' chronology of the incident, taken from later police interviews, and their characterization of Martin's state of mind presented conflicting material facts precluding summary judgment on the basis of immunity. The nationwide importance of this case is obvious not only to

the law enforcement community, but to all others who claim qualified immunity short of trial. If the objective reasonableness of conduct shown not to have violated clearly established law is to result in denial of the claimed immunity because adverse parties' *post hoc* views of the material circumstances will necessarily differ or those adverse parties are permitted to avoid dismissal by challenging the officer's state of mind, qualified immunity and the goals intended for it by this Court are doomed. For, as here, a trial will be necessary where the jury, hearing the opposing parties' evidence of circumstances and state of mind, will decide the immunity issue and the law of immunity will have returned to the standards of *Wood v. Strickland*, 420 U.S. 308 (1975) disavowed by *Harlow* and its progeny.

II.

THERE IS SHARP DIVISION AMONG THE CIRCUIT COURTS CONCERNING HOW PRE-TRIAL QUALIFIED IMMUNITY IS TO BE GRANTED WHEN THE UNDERLYING CAUSE OF ACTION MAKES DEFENDANT'S SUBJECTIVE MOTIVATION MATERIAL.

Many constitutional torts have an element which requires proof of a state actor's intent, bad motive or animus toward plaintiff to be actionable. E.g. *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (class based animus essential for action under § 1985(3); *Washington v. Davis*, 426 U.S. 229 (1976) (purposeful racial discrimination necessary to violate 14th Amendment); *Estelle v. Gamble*, 429 U.S. 97 (1976) (violation of Eighth Amendment requires

showing of deliberate indifference); *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1981) (§ 1981 claim requires evidence of purposeful discrimination); *Wayte v. United States*, 470 U.S. 598 (1985) (selective prosecution claim must be supported by evidence of discriminatory purpose). In the case of an excessive force claim, plaintiff's cause requires proof that the force was used for an improper purpose. *Patzner v. Burkett*, 779 F.2d 1363, 1371 (8th Cir. 1985).

Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982) turned qualified immunity on objectively reasonable conduct and eschewed inquiry into the actor's subjective state of mind. This Court has described *Harlow* as "purg[ing] qualified immunity doctrine of its subjective components," *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) or as "reject[ing] the inquiry into state of mind in favor of a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191 (1984). Most recently, this Court confirmed that "an allegation of malice is not sufficient to defeat immunity, if the defendant acted in an objectively reasonable manner." *Malley v. Briggs*, 475 U.S. 335, 341 (1985).

The problem that results in the qualified immunity analysis where motive or intent is an element of the underlying claim is that if the "clearly established law" makes conduct legal or illegal depending upon the actor's intent, qualified immunity becomes dependent upon an examination of that intent, a result facially at odds with *Harlow* and its progeny. *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984) *cert. den.* 471 U.S. 1066 (1985); *Halperin v. Kissenger*, 807 F.2d 180, 184 (D.C. Cir. 1986); *Martin v. D.C. Metropolitan Police Dep't.*, 812 F.2d

1425, 1432 (D.C. Cir. 1987) *reh. den. sub. nom.* 824 F.2d 1240 (D.C. in 1987).

In general, the Circuit Courts have not read literally *Harlow's* avoidance of inquiry into subjective motivation as foreclosing that inquiry for qualified immunity purposes when the substantive law requires examination of intent or motive. *Musso v. Hourigan,* 836 F.2d 736, 743 (2d Cir. 1988); *Turner v. Dammon,* 848 F.2d 440, 450-53 (4th Cir. 1988) (dissent); *Kenyatta v. Moore,* 744 F.2d 1179, 1185 (5th Cir. 1984) cert. den. 471 U.S. 1066 (1985); *Poe v. Haydon,* 853 F.2d 418, 431 (6th Cir. 1988); *Rakovich v. Wade,* 850 F.2d 1180, 1210 (7th Cir. 1987); *Wright v. South Ark. Regional Health Centers, Inc.,* 800 F.2d 199, 205 (8th Cir. 1985); *Allen v. Scribner,* 812 F.2d 426 436 (9th Cir. 1987); *Pueblo Neighborhood Health Centers, Inc. v. Losarvio,* 847 F.2d 642, 648 (10th Cir. 1988); *Halperin v. Kissinger,* 807 F.2d 180, 185-187 (D.C. Cir. 1986). However, four Circuit Courts have expressly noted the want of explicit guidance from this Court in dealing with qualified immunity claims the grant of which are dependent upon an inquiry into motive and state of mind. *Benson v. Allphin,* 786 F.2d 268, 276 n.19 (7th Cir. 1986); *Halperin v. Kissinger,* 807 F.2d 180 185-86 (D.C. Cir. 1986); *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.,* 838 F.2d 1031, 1050 n.26 (9th Cir. 1988); *Poe v. Haydon,* 853 F.2d 418, 431 n.9 (6th Cir. 1988). Assuming, as have the Circuit Courts noted above, that Harlow permits inquiry into subjective motivation to resolve a qualified immunity claim because the substantive law will turn the claimed immunity on the actor's state of mind, there is a sharp divergence in the pre-trial methods the Circuit Courts employ in deciding the immunity issue.

First, at least four circuits take *Harlow* at face value and look to whether objectively reasonable conduct violated clearly established rights without inquiry into subjective motivations. *Lee v. Mihalich*, 847 F.2d 66, 70 n.8, 72 n.13 (3d Cir. 1988) (§ 1983 malicious prosecution); *Washington v. Starke*, 855 F.2d 346 (6th Cir. 1988) (excessive force); *Klein v. Ryan*, 847 F.2d 368, 372 (7th Cir. 1988) (excessive force); *Garcia by Garcia v. Miera*, 817 F.2d 650, 655-56 (10th Cir. 1987) (excessive force); *Turner v. Dammon*, 848 F.2d 440, 445 (4th Cir. 1988)(objectively unreasonable searches).

Second, some courts avoid the subjective inquiry totally by allowing a jury to determine the motivation issues, *Lowe v. City of Monrovia*, 775 F.2d 998, 1011 (9th Cir. 1988), holding that qualified immunity is not a defense when motive is in issue. *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1051 (9th Cir. 1988) following *Goodwin v. Circuit Court of St. Louis County, Mo.*, 729 F.2d 541, 545 (8th Cir. 1984).

Third, some Circuit Courts, on the other hand, have devised mechanisms for dealing with these types of pretrial immunity claims. In the first category is the Seventh Circuit which has adopted a two-prong test. *Wade v. Hegner*, 804 F.2d 67, 69 (7th Cir. 1988). If a plaintiff's assertions of improper motive are concretely supported, then impermissible intent is assumed in determining whether the challenged conduct makes out a constitutional violation. Then, the second step is to determine whether the constitutional standards were clearly established. See also, *Garcia by Garcia v. Miera*, 817 F.2d 650, 655 n.7 (10th Cir. 1987).

The more widely followed test is that formulated in *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1433-1435 (D.C. Cir. 1987). If a defendant's pre-trial immunity claim shows objectively reasonable conduct, then Plaintiff must "come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive." *Id.*, at 1435. Otherwise, the immunity is to be granted. Two Circuits follow this formulation. *Poe v. Haydon*, 853 F.2d 418, 431 (6th Cir. 1988); *Pueblo v. Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 648 (10th Cir. 1988); see, *Turner v. Dammon*, 848 F.2d 440, 450-53 (4th Cir. 1988) (dissent).

The major significance of this case to proper resolution of qualified immunity claims against a specific intent backdrop is obvious. If this Court intended *Harlow* and the cases following it to require only an examination of whether the conduct at issue is objectively reasonable without regard to intent, then the error of all Circuits can be corrected now. Alternatively, if motivating intent is to figure into qualified immunity resolution, then this case presents a timely occasion for the analysis to guide all Circuit Courts on increasing numbers of immunity claims where correct analysis of underlying intent is necessary to accomplish the goals of *Harlow* envisioned. For whether this Court follows the Seventh Circuit two-part test, the measure prescribed by the D.C. Circuit or devises its own prescription, tenuous and unsupported claims of malice ought not dislodge a properly supported pre-trial claim of immunity, whether the claims of improper motive are submitted directly in resistance to a summary judgment motion or, as here, the claims come

through in the form of double hearsay which the Eighth Circuit allowed to thwart Petitioner's immunity claim.

CONCLUSION

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court revitalized summary judgment motions as integral to disposing of insubstantial lawsuits. The purposes behind *Harlow* and the cases following it dovetail with the role assigned summary judgment procedure and coincide in this case and the Circuit cases explored above. The importance of qualified immunity as a pre-trial tool designed to avoid the risk of trials against public officers, the attendant social costs and distraction from duty over discretionary decision making can be easily lost if either marginal assertions of impermissible motive are taken to prevent attachment of immunity or summary judgment fails to fulfill its function of weeding out opposing evidence "of insufficient caliber or quantity to allow a rational finder of fact to find actual malice . . . " *Id.*, 477 U.S. at 254. Here, both the summary judgment procedure and the qualified immunity asserted through it were lost to Deputy Martin, a result that cannot be tolerated. For, when a policeman uses deadly force to repel threats upon his life by those able to fulfill the threats made, it is constitutionally unreasonable to deny to that officer the immunity from suit which *Harlow* and the cases after it guarantee. *Sampson v. Gilmere*, 476 U.S. 1124 (1986).

It is respectfully urged that Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-2331SI

Albert Lee Walker, et al, Appellees,	*	Appeal from the United States District Court for the Southern District of Iowa.
vs.	*	
Wayne County, et al, Appellants.	*	

Appellants' petition for rehearing en banc has been considered by the Court and is denied. Petition for rehearing by the panel is also denied.

August 12,1988

Order entered at the Direction of the Court:
/s/ Robert St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-2331

Albert Lee Walker; Judith Walker; William J. Walker; Laura Christine Walker; Tonya Faye Walker; and Tanya Renee Walker, by their Mother and Next Friend, Judith Walker, Appellees, v. Wayne County, Iowa, and Roger Martin, Appellants.	* * *

Roger Martin attempted to arrest Walker. A struggle occurred during which Martin shot and wounded Walker. Walker and his family (the Walkers) then sued Martin and Wayne County, Iowa, for damages und 42 U.S.C. § 1983. In response, the defendants filed a motion for summary judgment in which they asserted, among other grounds for relief, that qualified immunity protected Martin from suit. After a hearing, the district court denied the defendants' motion in a brief order.

The defendants appealed only the denial of Martin's claim to qualified immunity. We remanded to the district court to identify the genuine issues of material fact that barred summary judgment based on qualified immunity. *See Anderson v. Roberts*, 823 F.2d 235, 237-38 (8th Cir. 1987). The district court issued a supplemental order, and on review, we affirm the denial of the defendants' motion.

To support their summary judgment motion in the district court, the defendants filed evidentiary materials, including several sworn affidavits that recited the events leading up to the shooting and an Iowa Division of Criminal Investigation Report (DCI report) on the shooting incident. In one of the affidavits, Martin stated he feared for his safety after Walker, intoxicated and belligerent, threatened Martin's life several times, resisted arrest, and struggled physically with Martin. Martin indicated that just before the shooting occurred Walker had charged at Martin screaming, "I'm going to kill you." Martin further stated that Walker had refused to heed his commands to halt. The Walkers did not file any evidence in response to the defendants' summary judgment motion.

In its supplemental order, the district court referred to the DCI report and indicated that summaries of police interviews with Walker and his wife raised several genuine issues of material fact. Specifically, the court stated that the Walkers' interviews raised factual questions of whether Walker was belligerent and threatened Martin's life and whether, under the circumstances presented, shooting Walker constituted excessive force. Therefore, the court denied the motion.

When ruling on a summary judgment motion, the district court may consider only the portion of the submitted materials that is admissible or useable at trial. *See Anderson*, 823 F.2d at 238; *Aguilera v. Cook County Police & Corrections Merit Bd.*, 760 F.2d 844, 849 (7th Cir.), *cert. denied*, 474 U.S. 907 (1985). Thus, without a showing of admissibility, a party may not rely on hearsay evidence to support or oppose the motion. *See Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1319 (8th Cir. 1986); *see also Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987). Nevertheless, if a party fails to challenge hearsay evidence submitted to the court, the court does not commit error in considering such evidence. *See Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 294-95 (8th Cir. 1987); *Williamson v. United States Dep't of Agric.*, 815 F.2d 368, 383 (5th Cir. 1987).

Here, the district court relied on police interviews with Walker and his wife to conclude there were disputed issues of material fact in this case. The interviews were not reported verbatim, and any statements by the Walkers were unsworn. When viewed in the context of the DCI report, the Walkers' interviews constitute inadmissible double hearsay. *See John McShain, Inc. v. Cessna*

Aircraft Co., 563 F.2d 632, 636 (3d Cir. 1977) (per curiam) (statements made by third persons and noted in an investigation report will generally not be admissible); Fed. R. Evid. 803(6) comment (bystander's statements in police report are inadmissible); *see also Grogg v. Missouri Pac. R.R.*, 841 F.2d 210, 214 (8th Cir. 1988); *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522, 529-30 (D. Md. 1987).

The defendants might have been entitled to summary judgment if only the sworn affidavits were involved. The defendants, however, also submitted the DCI report, and we agree with the district court that the hearsay statements in the report generate genuine issues of fact. The real issue is whether the district court committed reversible error by relying on inadmissible double hearsay to deny the defendants' motion. We conclude the district court's actions were proper.

First, although the DCI report contained inadmissible double hearsay, the report was submitted by the defendants without reservation of any part. consequently, the defendants cannot complain because the district court considered the contents of that report. *See Dautremont, 827 F.2d at 294-95; see also Eguia v. Tompkins*, 756 F.2d 1130, 1136 (5th Cir. 1985). Second, the district court's reliance on inadmissible double hearsay was not misplaced here. The Walkers have personal knowledge of the events leading to the shooting, and clearly, their version of those events will be admissible at trial through the Walkers' personal testimony. *See Pink Supply Corp.*, 788 F.2d at 1319; Fed. R. Evid. 602. As a result, the district court's refusal to grant the defendants' motion did not merely delay the inevitable denial of the Walkers' claim. Under these circumstances, the defendants were not prejudiced

by the district court's consideration of inadmissible evidence contained in the DCI report at the summary judgment stage of the proceedings.

Accordingly, we affirm the denial of summary judgment and remand to the district court for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ALBERT LEE WALKER, et at., Plaintiffs,	) CIVIL NO. 84-757-A
vs.	) SUPPLEMENTAL RULING
WAYNE COUNTY, IOWA, et al., Defendants.	)

(filed Jan. 25, 1986)

On September 15, 1986, this Court entered a brief order denying the defendant's motion for summary judgment stating that "there are a number of disputed material facts." The defendants took a direct appeal from this Courts' denial of a summary judgment on the good faith immunity assertion. On November 24, 1987 the matter was remanded to this Court "for the limited purpose of supplementing its ruling to identify the disputed material facts."

In the Court's opinion there are several factual disputes relating to the incident that resulted in Albert Walker being shot in the abdomen by deputy sheriff Roger Martin. In ruling upon a motion for summary judgment, the Court must accept the evidence in the light most favorable to the non-moving party. The Court takes the following excerpts from the investigating officers reports. The reports of Special Agents Quinn and Harris stated:

> Approximately five to ten minutes after AL had returned home, Wayne County Deputy, ROGER MARTIN, arrived at AL'S residence. The Deputy

asked AL who was driving the yellow pickup when it came into town. AL replied that he had been driving the vehicle. The deputy stated to AL that he had been going around eighty miles per hour (80 mph) when he came into town. AL then stated that he did not think he had been going that fast. The deputy asked AL if he was calling him a liar. AL replied that he was not, but that he felt he was only going about sixty miles per hour (60 mph) at the time. AL stated to the deputy that all he was trying to do was to find out who killed his dog. The deputy replied that he did not and told AL the he was under arrest for speeding. AL stated to the deputy, "No, I'm not." At this time the deputy struck AL with some type of instrument. When asked if he had said or done anything to provoke the officer to strike him, AL stated that he could have said something, but he did not remember.

MR. WALKER did remember stating to the officer, "I'll get even with you for hitting me." He could not understand why ROGER had hit him, as the two knew each other, and used to go to school together. After AL had been struck, he fell down to the ground and put his hand on his forehead, and noticed that he was bleeding pretty bad. At this time, AL stated that the deputy again instructed him that he was under arrest. AL's wife then took the instrument he used to hit AL with from the deputy, and remembers his wife stating, "Please, don't hit him anymore." AL stated that after he had been hit by the deputy, he was upset and decided to leave. He got up from the ground and got into the cab of his truck. AL's wife stopped him from leaving, so AL got out of the truck and started toward ROGER MARTIN, the deputy. AL stated that at this time, ROGER got the gun and shot him.

AL could not remember what was said, as everything seemed to happen so fast. After asking AL again if the deputy said anything to him, while he was walking towards him, AL thought he remembered the

deputy instructing him to put his hands on the car. The next thing AL remembers is being shot.

AL was asked if he kept any weapons in the cab of his truck, and replied by stating, "No". When asked if he had anything in his hands when he came towards the deputy, he again stated, "No." AL again told this reporting agent that while in the cab he tried to turn the switch key on, but his wife grabbed it. He got out of the truck and did not get anything from the cab.

MR. WALKER stated just prior to conducting the interview, he is currently employed as a maintenance man for Humeston, having been hired in May of 1983. He worked part-time for the City, prior to his full time employment.

During the interview, he stated that he has not had any problems with Deputy ROGER MARTIN prior to the incident that occurred on Sunday, June 3, 1984. The last time MR. WALKER had seen DEPUTY MARTIN was sometime in March or April when he took his oldest daughter to the Legion Hall.

The report of Special Agent Larry D. Goepel stated:

JUDY WALKER advised the cop pulled up and when he came up she could tell he was madder than an old wet hen. She stated the ROGER came up to the truck and ALBERT was back in the seat. He said "I want to know who was driving that truck, driving into town 80 mph squealing the tires and raising hell." JUDY stated the ALBERT said "me or I was" and he didn't say it snotty-like. She indicated the ROGER grabbed him, hit him with a billy club or night stick up in here, pointing the left side of her face. There was a lot of blood. AL started to fight in back and they landed on the ground. She stated that she and LORI jumped on ROGER and she got the club away from him. They got up and ROGER pushed her down and wanted his club. She stated she told him to get another cop. AL was trying to tell

him about the dog, but she indicated that ROGER didn't care.

JUDY WALKER further advised that he told AL he was under arrest and AL said "no, I aint." ROGER said, "yah, you're under arrest" and ALBERT said, "no, I ain't taking me to jail." Mrs. Walker advised that she kept telling him to call another cop. AL said he would shoot him or something and was pretty hostile but he didn't have no gun. ROGER was on the radio doing something and anyway AL went to the pickup, and she followed him. He got in and was trying to start the pickup and she stated she put her hand on his and got the keys from him and told him to calm down. He was crying about the dog. About that time ROGER said, "get out of that truck" and ROGER had the gun pointed where they were standing.

JUDY WALKER advised that AL got out of the truck and started walking back towards ROGER and he had his hands up and out to the side. She stated ALBERT said, "you can shoot me if you want to" and he shot him and AL fell down. As to how far away ROGER was when questioned, JUDY WALKER stated he wasn't very far. She stated that ROGER was even with the back end of the truck and he was standing still.

JUDY WALKER did draw a rough sketch for orientation purposes with regard to the scene and a copy of that sketch is attached to this interview as an exhibit.

JUDY WALKER advised that she started screaming and that is about all she remembers. ROGER was down on the ground doing something before the other guys got there. She was questioned as to what kind of gun it was and she stated that she doesn't know but she advised it had brown wood on it. There was no gun in the pickup.

As to how much she had to drink, JUDY WALKER stated she had a beer at the camp, one at home, part of one that AL left at home, and she had one opened when this all happened. She stated that PBR is what she bought and he had regular beer cans.

It should be noted a brief break was taken in the interview and subsequent to this, JUDY's mother was present for a short portion of the interview. Also present during the interview at various times were Assistant DCI Director Eugene Meyer, and SAC Sam Swaim with Meyer being present early in the interview and Swaim at at time period prior to the break.

Further concerning the gun used, JUDY WALKER stated that it was no pistol and it was a big gun. She was asked as to whether she saw the shooting and she stated that she was standing right there with him. She stated it, referring to the gun, made a loud noise and there was one shot.

JUDY WALKER stated that ROGER looked mean and mad when he came up there. As to whether they knew ROGER, the reporting agent was informed by JUDY WALKER that she didn't really but that AL and ROGER had gone to school together, she guessed and were friends; but that she didn't know and she wouldn't swear they did go to school together.

Defendants would be entitled to summary judgment on the basis of qualified immunity if the force used did not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 2738 (1982). It was clearly established at the time of this incident that the use of excessive force violated the Constitution. *Wing v. Britton*, 748 F.2d 494, 497 (8th Cir. 1984). However, defendants claimed that it has not been clearly established "that the use of force by a police officer who is

faced with a belligerent, intoxicated, adult male threatening death to the arresting officer constitutes excessive force."

Assuming this to be correct, the Court believes that the evidence referred to above raises factual issues for the jury's determination as to:

1. Whether under this evidence Mr. Walker was in fact a belligerent adult male threatening death to the arresting officer;

and

2. Whether shooting Mr. Walker in the abdomen at close range under such a situation constituted excessive force.

The Court believes that such testimony, if believed by a trier of fact, would preclude the Court in holding, as a matter of law, that deputy Martin had not violated clearly established legal rules concerning excessive force and therefore was entitled to qualified immunity. A jury could conclude that a reasonable officer would not have believed that he could lawfully use the force he did under such circumstances.

IT IS ORDERED that this Supplemental Ruling be filed and a certified copy sent to the Eighth Circuit Court of Appeals.

Signed this 25th day of January, 1988.

/s/ W. C. Stuart
W. C. STUART, JUDGE
SOUTHERN DISTRICT OF IOWA

APPENDIX D

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-2331

Albert Lee Walker; Judith Walker; William J. Walker; Laura Christine Walker; Tonya Faye Walker; and Tanya Renee Walker, by their Mother and Next Friend, Judith Walker,	* * *

wounded Walker. Walker and his family (Walker) then sued Martin and Wayne County, Iowa, under 42 U.S.C. § 1983. In response Martin and Wayne County filed a motion for summary judgment, and in that motion, Martin contended he was entitled to qualified immunity from suit for money damages. After a hearing the district court denied the motion in a brief order. The court stated only that "a number of disputed material facts" still existed in the case.

Because of the brevity of the district court's order, we are unable to identify the basis for the summary judgment ruling to the extent it denied Martin's claim to qualified immunity. Accordingly, we remand to the district court for the limited purpose of supplementing its ruling to identify the "disputed material facts" which lead the court to believe that a reasonably cautious officer in Martin's circumstances would not have shot Walker. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3038-40 (1987); *Anderson v. Roberts*, 823 F.2d 235, 237-38 (8th Cir. 1987). In making this additional ruling, the district court shall consider only the material in the record at the time of its order denying the motion. The parties may not expand the record to include material not previously before the district court. The district court shall then certify its supplemental ruling to the Eighth Circuit Clerk of Court for further proceedings in this court.

Remanded.

(Seal)

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ALBERT LEE WALKER; JUDITH WALKER; WILLIAM J. WALKER, LAURA CHRISTINE WALKER, TONYA FAYE WALKER and TANYA RENEE WALKER, by their Mother and Next Friend, JUDITH WALKER, Plaintiffs, v. WAYNE COUNTY, IOWA; and ROGER MARTIN, Defendants.	NO. 84-757-A NOTICE OF APPEAL

(filed Oct 9, 1986)

NOTICE is hereby given that Defendants Wayne County Iowa and Roger Martin hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Order of September 15, 1986 by the Honorable District Court, W.C. Stuart, presiding, denying and overruling the assertion of good faith immunity.

Dated this 7th day of October, 1986.

AUSTIN & GAUDINEER
/s/ Carlton G. Salmons
Carlton G. Salmons

900 Des Moines Building
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APPENDIX F

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ALBERT LEE WALKER, et al., Plaintiffs,	)	CIVIL NO. 84-757-A
vs.	)	ORDER
WAYNE COUNTY, IOWA, et al., Defendants.	)	

(filed Sep 15, 1986)

The Court has before it defendants motion for summary judgment and plaintiffs resistance thereto. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment shall be rendered if the pleadings, depositions, admissions and affidavits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

In this case, there are a number of disputed material facts, and the moving party has not shown that it is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is denied.

Signed this 15th day of September, 1986.

/s/ W. C. Stuart
W. C. STUART, JUDGE
SOUTHERN DISTRICT OF IOWA

(2)

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-752

In The

Supreme Court of the United States

October Term, 1988

ROGER MARTIN,

Petitioner,

v.

ALBERT LEE WALKER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a federal district court may properly deny a summary judgment motion regarding a claim of qualified immunity based upon inferences drawn from a police report submitted and relied upon by the party seeking immunity when the report may have contained inadmissable hearsay.

PARTIES IN THE COURT BELOW

The petitioner appeared as the sole appellant in the court below.

The respondents appeared in the court below as appellees. Although Albert Lee Walker was named as the sole respondent in the petition, the following parties to the decision below also wish to appear as respondents in this matter: Judith Walker, William J. Walker, Laura Christine Walker, Tonya Faye Walker, and Tanya Renee Walker.

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No. 88-752

In The

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ROGER MARTIN,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The June 27, 1988, opinion of the court of appeals (Pet. App. 2-6) affirming the district court's denial of summary judgment is reported at 850 F.2d 433. The court of appeals' order denying petitioner's motion for rehearing and suggestion for rehearing en banc (Pet. App. 1) is unreported. The original September 15, 1986, order of the district court (Pet. App. 17), the November 24, 1987, order of the court of appeals remanding the case for further findings (Pet. App. 13-14), and the district court's January

25, 1988, supplemental order (Pet. App. 7-12) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1988. Petitioner's request for rehearing was denied on August 12, 1988. The petition for a writ of certiorari was filed on November 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

1. On October 17, 1984, respondents filed the present action in the United States District Court for the Southern District of Iowa. This action was brought, in part, under 42 U.S.C. § 1983 (1982).

This action arose out of an incident which occured on June 3, 1984.* On that date, petitioner Martin saw respondent Albert Walker operating a car in a reckless manner. After witnessing respondent's reckless driving, petitioner drove his patrol car to respondent's home, where he confronted respondent in his front yard.

During that confrontation, a fight broke out between petitioner and respondent in which petitioner hit respondent with his sap injuring him. Respondent Judith Walker, Albert Walker's wife, helped break up the fight

*A detailed summary of the facts in this case with citations to the record is contained in the Appellees' Brief and Argument filed in the court of appeals at pages 2-4.

by taking the sap away from petitioner. At that time, she told petitioner to call for another police officer.

Petitioner told respondent that he was under arrest. Respondent said "no I ain't, you ain't takin me to jail." With that, respondent walked to his pickup truck and entered the cab. Before respondent could start the pickup, his wife took the keys away from him and told him to calm down. While she was talking with respondent Albert Walker, petitioner went to his patrol car and radioed for further assistance. He then drove the patrol car behind respondent's pickup and got out with a 12 gauge shotgun. Petitioner inserted a shell in the chamber of the gun and ordered respondent out of his pickup.

In response to petitioner's order, respondent got out of the pickup and began walking towards petitioner. As he walked towards petitioner, respondent raised his hands in the air and said "go ahead and shoot me." Petitioner then fired the shotgun at respondent, hitting him in the chest and seriously wounding him.

At the time he was shot, respondent was unarmed. Petitioner had intended to arrest respondent for the misdemeanor offense of public intoxication.

2. On November 22, 1985, petitioner filed a motion for summary judgment. In the motion, petitioner alleged that he was entitled to summary judgment on his affirmative defense of qualified immunity.

In support of the motion for summary judgment, petitioner filed several affidavits. In addition, petitioner attached the report that the Iowa Division of Criminal Investigation ("DCI") compiled regarding the shooting to

his Statement of Material Facts as to Which No Genuine Controversy Exists. That report contained summaries of statements from a number of eye witnesses to the incident. Petitioner relied on statements in that report in arguing the qualified immunity issue before both the district court and the court of appeals and quoted several sections of the report in papers filed with those courts.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In any event, the decision below turns on an interpretation of the rules associated with summary judgment motions which is of no general importance. Accordingly, review by this Court is not warranted.

1. The decision of the Eighth Circuit below turns solely upon an issue of summary judgment law (Pet. App. 2-6) which is of no general importance. In this case, petitioner submitted a police investigation report as part of his summary judgment motion and relied on that report to support the motion (Pet. App. 3). The Eighth Circuit held that in these circumstances, a district court may consider the contents of such a report in deciding a summary judgment motion, even if the report might otherwise contain inadmissible hearsay (Pet. App. 5-6).

Petitioner in filing his motion for summary judgment and including the DCI report with the motion did so without stating any limitations on the use of that report. Moreover, petitioner himself cited verbatim portions of

the DCI report to both the district court and the Eighth Circuit. *See, e.g.,* Defendant-Appellant, Roger Martin's Brief and Argument at 6, 12 (filed with 8th Circuit in November 1986); Defendants' Supplemental to Statement of Material Facts as to Which No Genuine Controversy Exists at 6 (filed with district court in February 1986). The lower courts impliedly held that petitioner's failure to raise any limitation or objection to use of the report allowed the district court to use the report to draw inferences favorable to the non-moving parties (*i.e.,* respondents).

That decision comports with the general law regarding waiver. *See, e.g., Dautremont v. Broadlawns Hosp.,* 827 F.2d 291, 294-95 (8th Cir. 1987) (failure to raise objections to summary judgment materials waives any defects); *Williamson v. United States Dep't of Agriculture,* 815 F.2d 368, 383 (5th Cir. 1987) (waiver principles help prevent party from sandbagging district court); *Chambers v. United States,* 357 F.2d 224, 229 (8th Cir. 1966) (failure to object held to be waiver, since other party not afforded opportunity to correct any technical defects). In addition, the decision comports with the general principle of summary judgment law that all inferences from materials before the court deciding a summary judgment motion are to be interpreted in the light most favorable to the non-moving party. *See, e.g., Matsushita Electric Indust. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The decision below, therefore, was correct. *See also Poe v. Haydon,* 853 F.2d 418, 426 (6th Cir. 1988) (summary judgment inappropriate if "it cannot be determined before trial whether the defendant did acts that violate clearly established rights").

Although the decision below was based solely on an analysis of summary judgment law relating to documents which may have hearsay problems, the petition did not even mention the hearsay aspect of the opinion below until the concluding sentence of the Argument section. Because that opinion dealt with a narrow question of summary judgment law, rather than the qualified immunity issues raised by the petition, the petition improperly focuses the Court's attention on an issue not decided by either court below. The petition should, therefore, be denied.

2. Petitioner argues that there is a sharp division among the various courts of appeals concerning how qualified immunity should be analyzed when a subjective element forms part of the underlying consitutional violation (Pet. 9-14). While this Court has not given explicit guidance on that question, it has indicated that "government officials performing discretionary functions [will have] a qualified immunity [which] shield[s] them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. ___, 107 S.Ct. 3034, 3038 (1987). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Moreover, "the defendant is entitled to summary judgment [on the qualified immunity issue] if discovery fails to uncover evidence sufficient to generate a genuine issue as to whether the defendant in fact committed" acts which violated clearly established law. *Anderson*, 107 S. Ct. at 2816. Here, however, petitioner has failed to demonstrate that he is entitled to immunity or that the decision below conflicts with the decisions of the other courts of appeals.

The district court found that portions of the DCI report contained in petitioner's summary judgment motion indicated that there was a genuine issue of material fact (Pet. App. 12). Specifically, the district court cited portions of the record indicating that there was a factual dispute regarding respondent Albert Walker's actions just prior to the shooting. For example, the district court cited the following passage from the DCI report to support its conclusion:

> JUDY WALKER advised that AL got out of the truck and started walking back towards ROGER and he had his hands up and out to the side. She stated ALBERT said, "you can shoot me if you want to" and he shot him and AL fell down.

See Pet. App. 10. This statement contrasts materially with petitioner's alleged version of the incident. In the petition, petitioner described the same incident as follows:

> When Walker exited the truck, he advanced quickly towards Martin and yelled, "I am going to kill you". Martin ordered Walker to halt two or three times, but when he did not, shot Walker once, fearing for his life if the two fought again and Walker was able to gain control of his shotgun.

Pet. 4.

The two versions set up factual questions which are intertwined and relate to the question of qualified immunity. In determining whether there was a clearly established constitutional norm against shooting respondent, a trier of fact must determine which version of the facts is correct. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine

whether there is a genuine issue for trial"). While the constitutional violation alleged in the complaint may not have been "clearly established" if respondent was hurrying towards petitioner yelling "I am going to kill you", there can be no doubt that "clearly established" law prohibited petitioner from shooting respondent, when respondent was slowly advancing towards petitioner, had his arms extended out to his side, and carried no weapon. *See, e.g., Wing v. Britton*, 748 F.2d 494, 497 (8th Cir. 1984).

Petitioner had the burden to demonstrate in his summary judgment motion that there was no genuine issue of material fact regarding the surrounding circumstances to the shooting which indicated that he was entitled to qualified immunity under the *Harlow* doctrine. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). He failed to do so. As a result, this case does not pose a significantly important question nor does the opinion below demonstrate how this case has created a split among the courts of appeals regarding any signifcant issue.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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